No. 82-1932

In the Supreme Court of the United States

OCTOBER TERM, 1983

MYLES E. BILLUPS, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether venue for a prosecution under the Taft-Hartley Act, 29 U.S.C. 186(b), is proper in the district where commerce is affected.

2. Whether the evidence of the victim's economic fear was sufficient to sustain petitioner's conviction for extortion under the Hobbs Act, 18 U.S.C. 1951.

3. Whether a juror's inadvertent nondisclosure during voir dire that her son was an inactive member of a union requires a new trial.

4. Whether petitioner was improperly charged under the Travel Act, 18 U.S.C. 1952, with engaging in bribery where the evidence showed that he received a bribe.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Statutes:

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OPINION BELOW

The district court's post-trial opinion denying a motion for acquittal or a new trial is reported at 522 F. Supp. 935. The opinion of the court of appeals (Pet. App. 2a-52a) is reported at 692 F.2d 320. The amendment to the opinion of the court of appeals (Pet. App. 53a-54a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1982 and amended on April 29, 1983. A petition for rehearing was denied on March 29, 1983 (Pet. App. 1a). The petition for a writ of certiorari was filed on May 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on one count of interfering with commerce by extortion, in violation of the Hobbs Act, 18 U.S.C. 1951; one

count of interstate transportation to carry on an unlawful activity, in violation of the Travel Act, 18 U.S.C. 1952; and two counts of accepting illegal payments as a representative of a labor organization from an employer, in violation of the Labor Management Relations Act of 1947, 29 U.S.C. 186(b) (Taft-Hartley Act).[1] Petitioner was sentenced to three years' imprisonment on the Hobbs Act count, three years' imprisonment on the Travel Act count, and one year on each of the Taft-Hartley Act counts, all to be served concurrently. Petitioner was also fined $5,000 on each of these four counts. The court of appeals affirmed (Pet. App. 2a-52a).

1. The facts as reflected in the opinion of the court of appeals are as follows. Petitioner was International Vice-President of the International Longshoremen's Association (ILA) in Norfolk, Virginia (Pet. App. 4a). In essence, he was charged with abusing his office through a series of illegal transactions involving extortion and the receipt of payoffs from maritime employers operating in the Norfolk/Hampton Roads area.

a. In August 1975, the *S.S. Lash Pacifico*, a freighter owned by Prudential Lines (Prudential), encountered difficulty unloading at the port in Norfolk, Virginia, and had to be unloaded by navy personnel at the naval yard in Portsmouth, Virginia (Pet. App. 5a). When the ILA claimed that the work performed by non-ILA members violated its contract with Prudential, John Marano, vice-president of Prudential, contacted the company's stevedoring contractor. Marano was told that the union's wage claim, which could have been for as much as $130,000, could be limited to $29,000, but that petitioner would have to be contacted to make the necessary arrangements (*id.* at 5a-6a).

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[1]Petitioner was originally indicted on ten counts. At trial, two Taft-Hartley Act counts were dismissed for insufficient evidence. In addition, petitioner was acquitted on two Taft-Hartley Act counts, one Travel Act count and one Hobbs Act count (Pet. App. 3a n.1).

In September 1975, Marano contacted petitioner, who stated that he could settle the claim if he were paid $10,000 (Pet. App. 6a). In a subsequent conversation, petitioner told Marano that he preferred to deal directly with Prudential and to deal in cash. The first attempt to pay petitioner failed because Marano only had a check for $10,000. When petitioner arrived, he refused to accept the check, insisting on payment in cash and he complained to Marano about "dragging his feet" (*id.* at 7a). Petitioner's Hobbs Act conviction was based on petitioner's demand for $10,000 to arrange for the labor dispute to be settled.

Petitioner continually reminded Marano of the $10,000 "debt." In December 1975, Marano met with petitioner at Prudential's headquarters in New York. On this occasion Marano gave petitioner $4,000 in cash (Pet. App. A7). Petitioner's Travel Act conviction was based on petitioner's having traveled to New York to accept the $4,000 bribe.

b. In 1976, Quin Marine, a New York-based company, which provides support services to shipping companies, expanded its operations to the Norfolk, Virginia waterfront (Pet. App. 9a). In order to operate, Quin Marine found it necessary to secure a "work gang," which is a regularly assigned crew of ILA members. When initial efforts failed, William "Sonny" Mortella, Quin Marine's general manager, contacted petitioner for assistance. With petitioner's help, Quin Marine obtained the necessary work gangs (*id.* at 10a). Shortly thereafter Mortella met petitioner at a Norfolk hotel and offered him a $500 "gratuity" for his help, which petitioner accepted (*ibid.*).

In May 1978, after two other payments to petitioner for his help in solving ILA problems with Quin Marine, Mortella became an FBI informant because the agency discovered his involvement in illegal payments to labor and management officials on the waterfront (Pet. App. 11a). In

two tape recorded meetings with petitioner, Mortella made additional payments of $2,000 and $1,000. The $2,000 payment was made in August 1978 at the Wienerwald restaurant in New York City. The $1,000 payment was made in October 1978 at the Omni Hotel in Norfolk (*ibid.*). These two payments formed the basis of petitioner's Taft-Hartley Act convictions.

2. Prior to trial the district court conducted an extensive voir dire (Pet. App. 12a). All jurors were asked whether any of their relatives were members of a union and whether any relative had ever worked on the waterfront (*ibid.*). One juror answered "no" to the first question but "yes" to the second. The juror's son had been a dockworker, but he had been unemployed for some time and the juror assumed that her son was no longer a member of the union (*id.* at 13a). The juror was neither questioned nor objected to by either side and she was therefore selected to serve on the jury (*ibid.*).

After the trial, petitioner discovered that the juror's son was still a member of a local of the ILA, although he was inactive and not in good standing for failure to pay dues. The local to which the son belonged had a bad relationship with petitioner because of decisions petitioner had made as an officer of the union, and, indeed, the juror's son was himself hostile toward petitioner (Pet. App. 13a-14a). Petitioner moved for a new trial charging juror misconduct. The district court held a hearing at which the juror testified and after which the court denied petitioner's motion. The district court held that the juror's omission was inadvertent and that, whatever ill will her son may have felt toward petitioner, there was no showing that it had in any way poisoned the juror's mind against him (*id.* at 16a).

3. The court of appeals affirmed petitioner's convictions (Pet. App. 2a-52a). The court first held that the district court's post-trial hearing on the issue of whether the juror's

alleged misconduct affected the impartiality of her verdict was procedurally and substantively correct under *Smith* v. *Phillips*, 455 U.S. 209 (1982), and that the determination of no prejudice was fully supported by the record (Pet. App. 12a-16a). With regard to petitioner's Travel Act conviction, the court rejected petitioner's claim that there was insufficient evidence that he went to New York with an intent to accept a bribe. Instead, it found "ample evidence" to support the finding of intent (Pet. App. 27a). With regard to petitioner's Hobbs Act conviction, the court rejected petitioner's claim that there was insufficient evidence that the victim had agreed to pay petitioner $10,000 out of fear of economic harm, which is extortion, as opposed to an anticipated economic benefit, which arguably is bribery. The court held that the key is whether petitioner "intend[ed] to exploit the reasonable fear of the victim" (Pet. App. 41a), and that the evidence was sufficient to support the jury's finding that petitioner did (*id.* at 42a). Finally, the court held that venue for petitioner's Taft-Hartley Act convictions was proper because the evidence proved that the economic effect of the crime would be felt in the Eastern District of Virginia—where the employer making the payoff did its business (Pet. App. 42a-51a).

ARGUMENT

1. Petitioner contends (Pet. 21-29) that the courts below erred in ruling that venue for a Taft-Hartley Act prosecution will lie in the district where commerce is affected as opposed to the place where the money is received. This claim does not warrant review by this Court.

The Taft-Hartley Act does not have a specific venue provision. The district court reasoned that the language[2]

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[2]The Hobbs Act, 18 U.S.C. 1951, provides that "[w]hoever * * * affects commerce * * * by * * * extortion * * *" commits a crime. It is the requirement that the extortion must "affect[] commerce" which

and purpose[3] of the Taft-Hartley Act were closely analogous to those of the Hobbs Act and accordingly concluded that venue in the district where the effect of the crime on interstate commerce is felt, which is proper under the Hobbs Act, should also be permissible under Taft-Hartley Act. Since it is settled that Hobbs Act venue is proper in any district where the extortion affects commerce, see *United States* v. *Craig*, 573 F.2d 513, 517 (7th Cir. 1978); *United States* v. *Floyd*, 228 F.2d 913, 917 (7th Cir.), cert. denied, 351 U.S. 938 (1956), the district court and court of appeals held that venue was proper in this case because it is undisputed that the payoffs would affect commerce in the Eastern District of Virginia where the employer did its business.

The analysis of the courts below is reasonable and, as petitioner himself emphasizes (Pet. 21, 23, 24-25, 28-29), the issue has never been decided by any other court. Accordingly, review by this Court at this time is plainly unwarranted.[4]

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gives rise to venue under the Hobbs Act in the district where commerce is affected. *United States* v. *Craig*, 573 F.2d 513 (7th Cir. 1978); United States v. *Floyd*, 228 F.2d 913 (7th Cir.), cert. denied, 351 U.S. 938 (1956). The Taft-Hartley Act, 29 U.S.C. 186(a) and (a)(1), makes it unlawful "for any employee * * * to pay * * * any money * * * to any representative of any of his employees * * * in an industry affecting commerce." As the district court correctly noted, *United States* v. *Billups, supra*, 522 F. Supp. at 949, both the Hobbs Act and the Taft-Hartley Act require that the illegal payment affects commerce.

[3]The Hobbs Act was passed in 1948 and was directed at proscribing racketeering activities which affect commerce. In particular, it sought to differentiate between legitimate labor activity and labor racketeering. *United States* v. *Staszcuk*, 517 F.2d 53, 57 (7th Cir.) (en banc), cert. denied, 423 U.S. 837 (1975). The Taft-Hartley Act was passed in 1947 and sought to attack labor corruption and racketeering by prohibiting payoffs to union officials from employers engaged in an industry affecting commerce. 29 U.S.C. 186(a).

[4]Petitioner has not addressed the district court's alternative holding that any objection regarding venue was waived by failure to make such an objection prior to trial. *United States* v. *Billups, supra*, 522 F. Supp. at 951.

2. Petitioner contends (Pet. 29-32) that there was insufficient evidence to support his extortion conviction under the Hobbs Act because the victim testified that he really did not "fear" petitioner. There is no merit to this inherently factual claim.

It is clear that a victim's fear of economic harm can provide a sufficient basis for an extortion conviction under the Hobbs Act. See, *e.g., United States* v. *Gerald,* 624 F.2d 1291 (5th Cir. 1980), cert. denied, 450 U.S. 920 (1981); *United States* v. *Rabbitt,* 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979); *United States* v. *Rastelli,* 551 F.2d 902 (2d Cir.), cert. denied, 434 U.S. 831 (1977); *United States* v. *Hathaway,* 534 F.2d 386 (1st Cir.), cert. denied, 429 U.S. 819 (1976). Both courts below found ample evidence that petitioner's victim, Prudential vice-president Marano, actually and reasonably feared economic harm (522 F. Supp. at 940-945; Pet App. 40a-42a). Petitioner repeatedly demanded payment of the $10,000 for his assistance in the *Lash Pacifico* settlement. In addition, Marano knew that petitioner had the power as an officer of the ILA to disrupt Prudential's operations through actions such as a work slowdown, which could cause large economic losses to the company. Such evidence was more than sufficient to establish petitioner's effort to exploit Marano's reasonable fear of economic loss. See *United States* v. *Sander,* 615 F.2d 215, 219 (5th Cir. 1980); *United States* v. *Hathaway, supra,* 534 F.2d at 395; *United States* v. *Quinn,* 514 F.2d 1250, 1266-1267 (5th Cir. 1975), cert. denied, 424 U.S. 955 (1976).

3. Petitioner contends (Pet. 32-37) that the juror's inadvertent failure during voir dire to disclose her family relationship with a member of an ILA union local infringed upon his right to make peremptory challenges and thus warrants the granting of a new trial. This claim is without merit.

This Court held in *Smith* v. *Phillips*, 455 U.S. 209, 212-218 (1982), that in cases of alleged juror misconduct, the proper course is a post-trial hearing into the issue of whether the juror was actually prejudiced. See *Remmer* v. *United States*, 347 U.S. 227 (1954). In *Smith*, a juror had applied for a job as an investigator in the district attorney's office. The prosecutors learned of the juror's application during trial, but did not make any disclosure to the court. A post-trial disclosure was made and the state trial court held a hearing after which it concluded that the juror had not been prejudiced. This Court upheld that finding and held generally that the trial court's post-trial hearing on the issue of actual juror bias was the proper remedy for allegations of juror partiality. 455 U.S. at 218.

The facts underlying petitioner's claim are, if anything, less likely to be prejudicial than the situation in *Smith* v. *Phillips*. The juror's misstatement was inadvertent[5] and, in any event, she did indicate that a member of her family had worked on the waterfront, and that revelation did not even provoke petitioner's counsel to inquire further. Moreover, as in *Smith*, the district court examined the witness and concluded that there was no prejudice. That factual finding does not warrant review by this Court.

4. Finally, petitioner contends (Pet. 37-40) that the evidence was insufficient to sustain his Travel Act (18 U.S.C. 1952) conviction because the indictment charged that his travel was to promote the illegal activity of bribery, in violation of the New York Penal Code, but the evidence showed that his travel was for the purpose of receiving a

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[5]In the absence of a deliberate non-disclosure, there is no basis for petitioner's claim that his right to make peremptory challenges was abridged. *United States* v. *Brooks*, 677 F.2d 907, 912-913 (D.C. Cir. 1982); *Williams* v. *United States*, 418 F.2d 372, 376-377 (10th Cir. 1969).

bribe. This claim, which is raised for the first time in this Court, is frivolous.

In petitioner's view, the government was required to frame the indictment so as to track the statutory framework which exists within the New York Penal Code. That code lists as separate offenses bribing a labor official, N.Y. Penal § 180.15 (McKinney 1975), and receipt of a bribe by a labor official, *id.* § 180.25. Petitioner's complaint is that he should have been charged with interstate travel to promote the illegal activity of "bribe receiving" rather than "bribery." The reference to bribery in the charging language of the indictment is not, however, a reference to state law but to the scope of the illegal activities encompassed by the Travel Act, 18 U.S.C. 1952(b)(2). Moreover, this Court has specifically held that the appropriate inquiry is not the manner in which states classify their criminal prohibitions, but whether the particular state involved prohibits the activity charged. *United States* v. *Nardello,* 393 U.S. 286, 295 (1969). Accordingly, there was no variance between the indictment and proof in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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